No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1952

KENNETH C. GORDON AND KENNETH J. MACLEOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 493-501) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1952 (R. 502), and a petition for rehearing was denied on June 7, 1952 (R. 503). The petition for a writ of certiorari was filed on July 7,

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court unduly limited the cross-examination of the Government's key witness, in denying petitioners' motions for the production and inspection of certain pre-trial statements by the witness, and in denying their offer of evidence respecting the comments of a trial judge in another jurisdiction before whom the Government witness had previously pleaded guilty for participation in the same crime.

2. Whether the trial judge properly instructed the jury to consider separately the guilt of each defendant.

3. Whether the trial court erred in sending to the jury a transcript of the oral charges in the absence of petitioners and their counsel, and in delivering a supplemental charge which admonished the jury to have a proper regard and deference to the opinions of others.

4. Whether there was adequate proof of the value of the stolen goods transported.

STATUTES INVOLVED

18 U.S.C. 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * *; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

* * * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. (Supp. V) 2314 provides in pertinent rt:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On December 1, 1950, in the District Court for e Northern District of Illinois, a four-count indictment (R. 3-5) was filed against petitioners and e Albert Swartz.[1] Count 1 charged that on July , 1950, petitioners unlawfully, wilfully and knowgly had in their possession Kodak film which had en stolen from a common carrier while moving

[1] On May 28, 1951, the charges against Swartz, then eased, were dismissed on the Government's motion (R. 16).

in interstate commerce from Rochester, New York, to Chicago, Illinois, in violation of 18 U.S.C. 659. Count 3 charged a similar offense on July 27, 1950. Count 2 charged petitioners with causing the property described in count 1, of a value of more than $5,000 to be transported in interstate commerce from Chicago, Illinois, to Detroit, Michigan, in violation of 18 U.S.C. 2314. Court 4 charged a similar offense on July 27, 1950. After a jury trial, petitioners were found guilty and were sentenced generally to ten years' imprisonment (R. 466-468). On appeal, the judgments of conviction were unanimously affirmed (R. 493-501).

The evidence in support of the verdict may be summarized as follows:

On July 8, 1950, a trailer of the Interstate Motor Freight System was loaded at Rochester, New York, with cartons of Eastman Kodak film for shipment to Eastman at Chicago (R. 79-80, 81-84). Heavy waterproof paper was placed around the merchandise for protection, and the trailer doors were sealed shut (R. 22, 81). The bill of lading for the shipment (Govt. Ex. 67, R. 87), and Eastman Kodak packing records (Govt. Ex. 76, R. 150), listed cartons numbered 355 through 360 as included in the shipment.

The trailer arrived in Chicago early in the morning of July 10, 1950, apparently in good condition (Govt. Ex. 70, R. 128; see also R. 93-95). On July 11, when a driver of the Interstate company went to get the trailer for delivery to Eastman, he found the seals broken and torn paper on the ground (R.

105-111). (See also R. 92-104, 113-127.) The F.B.I. was notified (R. 275) and the trailer was then delivered to the Eastman plant in Chicago where it was unloaded (R. 130).

A comparison of the goods received (Govt. Ex. 75, R. 150) with the goods shipped as shown by the original bill of lading (Govt. Ex. 67, R. 87), established that the shortage consisted of:

91	cartons	8 mm Kodachrome Roll
14	"	8 mm Kodachrome Magazine
13	"	116 Verichrome Kodak
6	"	16 mm Commercial Kodachrome

Included in the cartons found to be missing were the cartons numbered 355 through 360, inclusive, containing 16 mm Commercial Kodachrome film.

On July 27, 1950, an F.B.I. agent observed a car pull into an alley at 215 East Erie Street. The driver, subsequently identified as one Marshall, went into the building and returned in a minute or two with petitioner MacLeod. Marshall drove his car before the door of a garage at 215 East Erie Street and MacLeod opened the garage door. MacLeod then drove an old Chevrolet truck marked "F. White" from the garage into the alley, and Marshall backed his car into the garage. A passenger in Marshall's car, subsequently identified as Albert Swartz, stood in the alley while the car was backed into the garage. After about five or ten minutes Marshall and Swartz drove off. The agent saw the back seat full of cartons marked "Kodak". (R. 276-278.)

Marshall, a jeweler in Ferndale, Michigan (R. 151), was arrested on July 28, 1950 (R. 175). At petitioners' trial he was a witness for the Government. He testified that on July 20, 1950, he drove from Detroit to Chicago with Swartz, who introduced him to petitioner Gordon at the latter's "Liberal Loan" Jewelry Store. (R. 151-152.) Thereafter the three men drove in Marshall's car to a spot where Gordon had his car parked, and then followed Gordon to a garage, the location of which was unknown to Marshall (R. 153-154). At the garage, a fourth man who "resembled [petitioner] MacLeod," drove an old truck with the name "White" on the side out of the garage and Marshall drove his car into the garage. Cases of Kodak film stacked therein were loaded into his car with the assistance of petitioners Gordon and MacLeod (R. 155-156). During the return trip, Swartz gave Marshall a list of the film obtained in Chicago, which Marshall after his arrest turned over to the F.B.I. (R. 158, Govt. Ex. 78). Marshall testified that on this date he and Swartz received 11 cases of 8 millimeter Kodachrome, 10 cases of roll Kodachrome and 13 cases of 116 film (R. 156, 191, 219). In Detroit, Swartz took one case of the 8 millimeter and one case of the 116 film (R. 157).

On July 27, 1950, Marshall and Swartz again drove to Chicago where they again met petitioner Gordon who gave Swartz an address in Marshall's presence (R. 165-166).[2] Swartz then directed Mar-

[2] Marshall testified that on July 22 he and Swartz obtained 10 or 11 cases of film from Gordon (R. 161-163).

shall to drive to "215 East Erie" where they met petitioner MacLeod who identfied himself as the "Ken" for whom they were looking (R. 167-169). Thereupon the three men walked to a garage adjacent to the property and petitioner MacLeod removed a truck from the garage which was the same one observed on the July 20 trip. Marshall drove his car into the garage where he and petitioner MacLeod loaded it with cases of film. (R. 169.) Marshall testified that on this date they obtained 20 to 24 cases of 8 millimeter Kodachrome Roll film and 5 or 6 cases of 16 millimeter Commercial film (R. 169, 170, 213, 218). Swartz took one case of the 16 millimeter film and several cases of the 8 millimeter rolls (R. 173).

After Marshall's arrest he turned over to the F.B.I. the film which he still had in his possession (R. 175, 231). Other film was recovered from Swartz and a customer to whom Marshall had sold film (R. 90, 239-240). Included therein was one full carton numbered 356 (Govt. Ex. 1, R. 483) and four empty cartons numbered 355, 357, 358 and 360,

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[3] In statements to the F.B.I., petitioners each admitted that they jointly owned the premises at 215 East Erie Street and the adjacent garage, but denied any knowledge that any stolen film was stored there (R. 260-261, 264-265, 270-273, 285-286). When he took the stand at the trial, petitioner Gordon testified that he refused to purchase film which Swartz wanted to sell him but that he gave Swartz the Erie Street address as a place to store film (R. 338-342). MacLeod testified that Gordon made arrangements for the parking of a truck in the garage, and that some days later a young man whose name he did not know requested him to open the garage. After cases had been unloaded from the truck, MacLeod backed the truck out to enable the man to drive in his car and load the back seat. (R. 357-365.)

respectively (Govt. Ex. 2-5, R. 483-484) of 16 millimeter Kodachrome film.

On August 14, 1950 in the Federal District Court, Detroit, Michigan, Marshall entered a plea of guilty of possession of the stolen film, but he had not been sentenced as of the date of testifying, May 31, 1951 (R. 175-176). On cross-examination, it was elicited that Marshall, shortly after his arrest on July 28, 1950, had signed a written statement (R. 194), which implicated Swartz but did not implicate either petitioner (R. 205). In response to petitioners' question, the prosecutor stated that he did not have that statement in court (R. 194). Petitioners' demands for the production of this statement were denied (R. 195, 205). Marshall also testified that he had made several additional statements, each varying slightly from the others for the reason that he remembered some new detail (R. 206). However, not until August 25, 1950, after some four or five statements, and after his plea of guilty, did Marshall implicate petitioners Gordon and MacLeod (R. 205-207). Petitioners' motions for the production of each of the statements were denied by the trial court (R. 207).

Marshall maintained that he was not testifying by reason of any threats, hope, or promise of immunity (R. 197). Petitioners' counsel sought to question him respecting the circumstances surrounding his waiver of indictment and plea of guilty, specifically as to whether he had been advised in open court that his counsel and the prosecutor had discussed the disposition of the case in

chambers with the trial judge. After objection, the jury and Marshall were dismissed temporarily. (R. 198.) Petitioners then offered to prove that in open court the Detroit trial judge stated (R. 199):

> Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding.

Petitioners' counsel continued to quote the court as stating:

> I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.

This offer of evidence was denied admittance by the trial court (R. 200), the court stating that it had permitted cross-examination as to Marshall's motives, but regarded as immaterial the statements of the court in the Detroit case. Thereafter, before the jury, Marshall reiterated that he was not testifying by reason of any threats, hope or promise of

immunity (R. 197, 204, 221). He stated that his attorney had advised him not to testify (R. 204).

After the jury had been out for 11½ hours, at about 10:35 p.m., the trial judge advised counsel that he would give the jury a charge "as taken from *Allen* v. *United States*, 164 U.S. 492" (R. 445). The court stated that if the jury requested further instructions he would advise them that the instructions already given were sufficient to guide their further deliberations (R. 446). Over petitioners' objections, the supplemental instruction was given. It contained the following language (R. 446-447):

> * * * Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to an unanimous result, you must examine any questions submitted to you with candor and with a proper regard and deference to the opinions of others. You should consider that the case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must come, and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it, nor that more or clearer evidence will be produced on the one side or the other.
>
> * * * * * *
>
> * * * But in conferring together you ought to pay proper respect to each other's

> opinions and reasons with a disposition to be convinced with each other's arguments, and on the one hand if much the larger number of you are for a conviction, the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression on the minds of so many men and women equally honest, equally intelligent, and who have heard the same evidence with the same attention, and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal the minority should equally ask themselves whether they may not reasonably and ought not to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

An hour later, at the request of the jury foreman, a typewritten copy of the charge as given was sent to the jury room (R. 471). The jury delivered its verdict at 3:10 a.m. the following morning.

ARGUMENT

1. Petitioners contend that the trial court committed prejudicial error in unduly restricting the scope of their cross-examination of Marshall, key witness for the prosecution, in two respects (Pet. 10-15): first, in denying their motions for the production, inspection and use on cross-examination of the pre-trial statements made by Marshall to agents

of the F.B.I.; and secondly in denying their proffer of evidence respecting the events which occurred in another jurisdiction in connection with Marshall's plea of guilty there for his participation in the events about which he testified. It is, however, well settled that the extent of cross-examination in a criminal case rests in the sound discretion of the trial court, and in the absence of abuse, the exercise of that discretion is not reviewable. *Glasser* v. *United States,* 315 U.S. 60; *Alford* v. *United States,* 282 U.S. 687; *Chevillard* v. *United States,* 155 F. 2d 929 (C.A. 9); *United States* v. *Tandaric,* 152 F. 2d 3 (C.A. 7), certiorari denied, 327 U.S. 786. There was no abuse of discretion here.

During an extended and searching cross-examination of Marshall, it was shown that, following his arrest on July 28, 1950, by agents of the F.B.I., he made some four or five written statements concerning the details of his unlawful possession of the stolen film, but did not implicate either petitioner until the last statement given on August 25, 1950, after he had pleaded guilty before the District Court in Detroit for his part in the crime (R. 205-207). Each statement differed slightly from the prior statements for the reason, as Marshall testified (R. 206), that he made an additional statement each time he remembered something. However, he stated that the earlier statements were consistent with his present testimony (R. 205). He stated further that he never received a copy of any of the statements and had not seen them since making them (R. 210-211). Petitioners do not contend that

Marshall used the statements in testifying, or referred to them in court to refresh his recollection.[4] Petitioners apparently sought the production of the statements for the purpose of impeaching Marshall by introducing prior inconsistent statements (R. 194, 205), but the fact of prior inconsistent statements was freely admitted by Marshall. The prosecutor stated that he did not have the statements with him and there was no reason to delay the trial to enable petitioners to prove a fact which was not disputed. In finding no abuse of discretion by the trial court on this matter, the Court of Appeals below aptly stated (R. 496-497):

> But, so far as the evidence discloses, there was no contradiction between the statements and his cross-examination. He was exhaustively cross-examined by two able counsel, and freely admitted that he did not name Gordon or MacLeod in the statements first made to the F.B.I. Had they been produced, showing in this respect, the very fact to which he testified, they would not have amounted to impeachment and would not, therefore, have been admissible.

[4] In *Goldman* v. *United States*, 316 U.S. 129, 132, this Court stated: "We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but also part of the Government's files, a large discretion must be allowed the trial judge." See also *Little* v. *United States*, 93 F. 2d 401 (C.A. 8), certiorari denied, 303 U.S. 644, where the court held the defendants not entitled to production and inspection of written statements mentioned in the Government witness' testimony, where the witness did not use the statements in testifying.

The second facet of petitioners' contention (Pet. 10-15) is that they were not permitted to introduce evidence of the statement by the District Judge at the time Marshall entered his plea (see Statement, *supra*). The court below in an exhaustive review of this matter (R. 497-500) noted that Marshall on cross-examination was "interrogated at length concerning any promises of reward, leniency or consideration" (R. 497). Marshall steadfastly maintained throughout that he was not testifying because of any threats, hope, or promise of immunity (R. 197, 204, 221). The record shows clearly that the jury had before it in the case at bar Marshall's plea of guilty in Detroit, the fact that he had not yet been sentenced, and that he did not, at first, involve petitioners (R. 175, 197, 198, 204, 221). The statement volunteered by the District Judge in Detroit added nothing to the possible implications from these facts. Accordingly, as the court below observed, the jury "had before it his own admissions in that respect and nothing in the transcript disputed them or added anything of substance thereto" (R. 499).

2. Petitioners contend (Pet. 15-16) that the trial court's initial instructions to the jury were prejudicial in that the court's usage of the term "either or both of the defendants" throughout certain portions of the charge (R. 431-433) admonished the jury, in essence, that a finding against one petitioner would justify a finding against both. Objections to these instructions were taken and overruled (R. 440). In addition, although they did not

object at the time,[5] (R. 440-442) petitioners argue here, as in the court below, that the trial court also erred in using the phrase "or either of them" in its instruction concerning the presumption of innocence (R. 434-435). A careful reading of this portion of the charge, as a representative example of the type of error complained of, will readily demonstrate the lack of merit in petitioners' argument. Thus, the trial court charged (R. 434-435):

> Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendants, *or either of them,* is guilty as charged in the indictment.
>
> * * * * *
>
> * * * and you cannot find the defendants *or either of them* guilty unless from the evidence you believe *such defendant or defendants* guilty of the offenses charged in the indictment, or some one of the offenses charged in the indictment, beyond a reasonable doubt. [Emphasis added.]

From the language italicized above, it is clear that the court advised the jury that two separate defendants were on trial and the fact of their individual guilt or innocence was for the jury to decide. Moreover, in determining whether a charge is erroneous or prejudicial, it is not enough

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[5] See Rule 30, F. R. Crim. P.

to consider isolated phrases out of context. The charge must be viewed as a whole and the portions complained of placed in proper setting. See *Boyd* v. *United States*, 271 U.S. 104, 107-108; *United States* v. *Kaadt*, 171 F. 2d 600 (C.A. 7); *Moffitt* v. *United States*, 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman* v. *United States*, 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852. The judge specifically charged (R. 433-434):

> Now, there are two defendants before you for trial. The guilt or innocence of the defendants is to be determined separately, and as to each defendant, only that evidence which was admitted by the Court against the respective defendant is to be considered in determining his individual innocence or guilt.

3. There is no substance to petitioners' contention (Pet. 17-19) that the trial court committed prejudicial error in sending to the jury written copies of both the initial and supplemental charges without notice to counsel and without petitioners or their counsel being present, and in giving a supplemental charge similar to that approved in *Allen* v. *United States*, 164 U.S. 492.

At 3:00 p.m., about four hours after the jury had retired, the trial judge, in accordance with his regular practice, sent the jury a transcript of his oral charge, prepared by the Court Reporter (R. 470-471). Counsel for petitioners stated as a matter of record that they were unaware of this practice and had no actual notice that the transcript was to go to the jury or that it did go (R. 470-474).

After giving the *Allen* charge, at the request of the jury, the judge also sent in a copy of his supplemental charge without notifying counsel (R. 471).

It is well settled that the trial court, acting in its discretion, may permit the jury to have written instructions with them in the jury room. See *Copeland* v. *United States*, 152 F. 2d 769, 770 (C.A. D.C.), certiorari denied, 328 U.S. 841; *Outlaw* v. *United States*, 81 F. 2d 805, 808-809 (C.A. 5), certiorari denied, 298 U.S. 665. Here, the transcript contained only that which had earlier been delivered orally. It was transcribed by the Court Reporter, examined by the trial court for accuracy, and then delivered to the jury (R. 471). Since opportunity had previously been afforded petitioners to object to the charge (R. 440), nothing would be gained by again submitting the same charge to them. This was not a fresh communication to the jury, as in *Fillipon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81, relied upon by petitioners (Pet. 18). Here there was merely the delivery of the charge as given reduced to writing. Accordingly, the absence of petitioner and counsel could not be prejudicial error.

As to the *Allen* charge, petitioners contend that the statement (R. 446-447):

> * * * you must examine any question * * * with candor and a proper regard and deference to the opinions of others.

was erroneous in that it "could have caused the jury to believe after many hours of argument and

continued confinement that the opinions of the press, the witnesses, Judge, prosecutor and general public should be considered" (Pet. 18). Again we submit that the charge must be read as a whole, and not in isolated phrases. *Boyd* v. *United States*, 271 U.S. 104, 107-108; *United States* v. *Kaadt*, 171 F. 2d 600 (C.A. 7); *Moffitt* v. *United States*, 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman* v. *United States*, 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852. The judge subsequently said "in conferring together you ought to pay proper respect to each other's opinions and reasons with a disposition to be convinced with each other's arguments" (R. 447). When the charge is thus considered as a whole (R. 446-447), it becomes obvious, as the court below observed, that (R. 500-501):

> The charge made it crystal clear that the jurors should consider the opinions of each other and make every reasonable effort possible to reconcile any differences. They were advised that it was their convictions, *i.e.*, those of each of the panel, based upon the evidence, which should control and that the opinions of no witness and of no counsel was of the slightest importance or relevance. They could not have possibly been misled.

The trial court's admonition that the case "must at some time be decided" did, admittedly, represent a departure from the usual language. However, the trial court did expressly explain that it was the jury's duty to decide the case, only if they

could conscientiously do so (R. 447). And read in the light of the charge as a whole, we submit that the error, if any, was harmless. See Rule 52(a), F. R. Crim. P.

4. Petitioners contend that as to counts 2 and 4, the Government failed to prove that the stolen film was of the requisite jurisdictional value of $5,000 or more (Pet. 19-20). However, Marshall testified as to the amount transported (see Statement, *supra*) and the General Traffic Manager of Eastman Kodak testified as to retail (R. 32-34) and wholesale prices as set forth in the official Eastman price list (R. 52-53, 63). On either basis the amount of the film transported was shown to have been considerably in excess of $5,000.[6] The fact that the film carried with it a right to have a roll developed does not detract from the retail or wholesale price since the right attaches to the film and obviously has value.

Since the verdict was general, the court below found it unnecessary to discuss petitioners' re-

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[6] The following table summarizes the testimony:

Quantity Transported	Type	Price per carton		Total	
		Retail	Wholesale	Retail	Wholesale
July 20					
10	8 mm Kodachrome Roll	$410.00	$270.00	$4,100.00	$2,700.00
11	8 mm Kodachrome	252.50	164.50	2,777.50	1,809.50
13	116 Verichrome	147.00	90.00	1,911.00	1,170.00
		Total Value		$8,788.50	$5,679.50
July 27					
20 to 24	8 mm Kodachrome Roll	$410.00	$270.00	$8,200.00 to 9,840.00	$5,400.00 to 6,480.00
5 or 6	16 mm Commercial Kodachrome (Sold direct R. 45-47)	367.50	367.50	1,837.50 to 2,205.00	1,837.50 to 2,205.00
		Total Value		$10,037.50 to 12,045.00	$7,237.50 to 8,685.50

maining contention that counts one and three would not sustain sentences for more than a year because the counts contained no allegation of value. As to those counts, value goes only to the punishment and not to the offense. The offense is possession of property known to have been stolen from an interstate shipment. Only if the stolen property is of less than $100 in value is the offense punishable as a misdemeanor. Hence the failure to allege value does not invalidate the indictment. And since the offense was shown to relate to property having a value of more than $100, the judgment may properly be sustained on counts one and three, as well as counts two and four.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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